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SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-275

AARON KATZ, on behalf of himself and all other persons similarly situated,

Petitioner,

against

NOLAN C. ASPINWALL, E. F. HILL, MARY JANET DELONG WALLIS, Administratrix of the Estate of W. L. DELONG, JR., deceased, W. L. FAUCETT, R. J. W. HOBBS, H. E. KOOIMAN, W. E. PRESCOTT, JR., PAUL S. WORRELL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No. .....

AARON KATZ, on behalf of himself and all other persons similarly situated,

Petitioner,

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NOLAN C. ASPINWALL, E. F. HILL, MARY JANET DELONG WALLIS, Administratrix of the Estate of W. L. DELONG, JR., deceased, W. L. FAUCETT, R. J. W. HOBBS, H. E. KOOIMAN, W. E. PRESCOTT, JR., PAUL S. WORRELL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Aaron Katz prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on May 22, 1972, which affirmed a judgment in favor of Defendants Nolan C. Aspinwall, E. F. Hill, Mary Janet DeLong Wallis, Administratrix of the Estate of W. L. DeLong, Jr., deceased, W. L. Faucett, R. J. W. Hobbs, H. E. Kooiman, W E. Prescott, Jr., Paul S. Worrell, granting Respondents' motion for summary judgment and dismissing a shareholder's derivative claim brought by plaintiff under the Securities Exchange Act of 1934 (15 US.C. § 78a et seq.).

Opinion Below

The Court of Appeals, 459 F. 2d 1045, affirmed without opinion the judgment and opinion of the District Court for the Northern District of Alabama granting Respondents' motion for summary judgment. (Appendices annexed hereto.)

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was entered on May 22, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented

May a state divest a federal court of jurisdiction of a stockholder's derivative claim brought under the Securities Exchange Act of 1934, which statute vests jurisdiction exclusively in the federal courts for all claims brought thereunder.

Statutory Provisions Involved

The statutory provisions involved include §§ 10(b) and 27 of the Securities Exchange Act of 1934 (15 U.S.C. §§ 78j(b) and 78aa) and Rule 10b-5 promulgated thereunder by the Securities and Exchange Commission (17 C.F.R. 240.10b-5).

Statement of the Case

The judgment below affirmed an order of the United States District Court for the Northern District of Alabama,

Southern Division, granting defendants' motion for summary judgment on the ground that the corporation, on whose behalf the action had been brought, had been judicially dissolved under Alabama law (Appendix C). The action is a shareholders' derivative action brought by plaintiff, a stockholder of United Security Life Insurance Company (USLIC), in the right of the corporation. The action, commenced in October 1964, alleges, *inter alia,* that the illicit use of insider information by corporate directors to their own benefit and to the detriment of USLIC, constituted a violation of Rule 10b-5.

The complaint asserts an almost garden variety fraud: the individual defendants, prior to recommending a merger, would buy stock in the about to be acquired company, would then as directors approve the merger on terms unfavorable to USLIC and finally would recommend to shareholders approval of the merger without disclosing their own interest in the acquired company. As a result of this unlawful conduct, the individual defendants acquired USLIC stock at a fraction of its then market price.

The facts asserted in the complaint, if proven, clearly give rise to relief under Rule 10b-5. *Superintendent of Insurance* v. *Bankers Life and Casualty Co.,* 404 U.S. 6 (1971); *Rekant* v. *Desser,* 425 F. 2d 872 (5th Cir. 1970); *Hooper* v. *Mountain States Securities Corp.,* 282 F. 2d 195 (5th Cir. 1960) *cert. den.* 365 U.S. 814; *SEC* v. *Texas Gulf Sulphur Corp.,* 401 F. 2d 833 (2d Cir. 1968) *cert. den.* 394 U.S. 976; *Hensley* v. *Shell,* 430 F. 2d 819 (5th Cir. 1970).

In February 1967, three years after the action was commenced, the Superintendent of Insurance determined that USLIC was insolvent, and a court appointed agent was directed to proceed to rehabilitate the corporation under Alabama law.

In May 1969, the Circuit Court of Alabama approved a plan of rehabilitation pursuant to which one James M. Fail was to organize a corporation to be named United Security Holding Company ("Holding Company"). Fail was then to transfer to Holding Company all of the outstanding shares of Public National Life Insurance Company, together with other assets in exchange for 2,203,239 shares of Holding Company. 796,761 shares of Holding Company (a number equal to the number of shares of USLIC issued, outstanding and entitled to vote) would then be transferred to USLIC in exchange for all of the assets and the assumption of all of the liabilities of USLIC. The 796,761 shares of Holding Company were then to be distributed to the shareholders of USLIC on a share for share basis, and USLIC would be liquidated. The effect of the plan was that USLIC stockholders became stockholders in Holding Company, whose balance sheet comprised the USLIC balance sheet plus the assets contributed by Fail for which he received 2,203,239 shares of Holding Company. Precisely the same result would have been achieved had USLIC itself issued 2,203,239 shares of its common stock in exchange for the assets that Fail contributed. In effect, the rehabilitation was nothing more than the infusion of capital in return for the issuance of stock.

The plan was thereafter consummated and USLIC liquidated.

The Basis for Granting Summary Judgment

The District Court granted defendants' motion for summary judgment solely on the ground that because USLIC had been judicially dissolved under Alabama law and since Alabama law makes no provision for the continuation of actions by or against judicially dissolved corporations, USLIC could not bring an action against directors who de-

frauded it, and therefore a derivative action previously brought in USLIC's behalf could no longer be prosecuted.

Reasons for Granting the Writ

The decision of the Court of Appeals, in affirming the District Court erodes the protections afforded to the public by the Federal Securities laws in general and the Securities Exchange Act of 1934 in particular, by divesting the federal courts of exclusive jurisdiction of a claim arising under the Securities Exchange Act of 1934 (§ 27—U.S.C. § 78aa) The effect of the decision is that in the case of derivative actions the protections afforded by the Securities Exchange Act would vary from state to state depending on the state corporation law. Even in the absence of a provision vesting exclusive jurisdiction in the federal courts, significant variations as to shareholder rights under the Federal Securities laws, which variations depended upon peculiarities of state law, would do violence to every concept of the Federal Securities laws. Those laws, including the Securities Exchange Act of 1934, were intended to establish a single national standard of conduct in connection with the purchase or sale of securities. (See Fleischer "Federal Corporation Law": An Assessment, 78 Harv. L. Rev. 1146 (1965).)

This matter has importance far beyond the confines of this case. There are innumerable contexts where by virtue of the peculiarities of local law, claims on behalf of corporations may be barred upon merger, dissolution or other acts of the corporation. The decision of the District Court as affirmed by the Circuit Court may have great influence because of the paucity of decisions dealing with the effect of dissolution under state law on an action which arose under the Securities Exchange Act.

The Importance of Preventing Erosion of the Federal Securities Laws

This Court has twice within the last year emphasized the broad sweep of Rule 10b-5. In *Superintendent of Insurance* v. *Bankers Life and Casualty Co.*, 404 U.S. 6, this Court stated:

> "We read § 10(b) to mean that Congress meant to bar deceptive devices and contrivances in the purchase or sale of securities whether conducted in the organized markets or face-to-face. And the fact that creditors of the defrauded corporate buyer or seller of securities may be the ultimate victims does not warrant disregard of the corporate entity. The controlling stockholder owes the corporation a fiduciary obligation—one 'designed for the protection of the entire community of interests in the corporation—creditors as well as stockholders.' *Pepper* v. *Litton*, 308 U. S. 295, 307." 404 U.S. at 12.

More recently, in *Affiliated Ute Citizens of Utah* v. *United States*, —— U. S. ——, 92 S.Ct. 1456, 31 L.Ed. 2d 741 (1972), this Court, referring to Rule 10b-5 held:

> "These proscriptions, by statute and rule, are broad and, by repeated use of the word 'any' are obviously meant to be inclusive. The Court has said that the 1934 Act and its companion legislative enactments embrace a 'fundamental purpose . . . to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry'. Securities & Exchange Commission v. Capital Gains Research Bureau, 375 U.S. 180, 186, 11 L. Ed. 2d 237, 243, 84 S. Ct. 275 (1963). In the case just cited the Court noted that Congress intended securities legislation enacted for the purpose of avoiding frauds to be construed

'not technically and restrictively, but flexibly to effectuate its remedial purposes.'" 92 S. Ct. at 1471, 31 L. Ed. 2d at 760.

The decision below in denying plaintiff his day in court under a federal statute (by a narrow reading* of the Alabama statute) seriously dilutes the protections afforded to investors under the Federal Securities laws. It is at odds with the general principle enunciated by this Court in *Wilko v. Swan*, 346 U. S. 427 (1953) that in enacting the securities laws the Congress sought to prevent the rights of the investing public from being maneuvered out of the protection of those laws. Indeed, in *Wilko* v. *Swan*, the Court held that the plaintiff himself could not waive his right to a trial under the Securities Act of 1933 even though he had signed a prior agreement expressly waiving that right.

A fortiori, a state statute cannot deprive a plaintiff of his right to trial on substantial claims arising under an overriding federal law, the Securities Exchange Act.

The Decision of the Fifth Circuit Below is in Conflict with the Decisions in Other Circuits

The holding in this case cannot be squared with a number of decisions in other circuits.

In *Miller* v. *Steinbach*, 268 F. Supp. 255 (SDNY 1967), a derivative action was brought on behalf of a corporation which had been merged into a second corporation. The

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* While this petition is sought solely on the ground that a state statute may not directly or indirectly divest the federal courts of jurisdiction of an action arising under Rule 10b-5, we argue that the court below could have avoided this serious issue by a broader, and we believe, more correct, reading of § 21 (97) of the Alabama Business Corporation Law, which provides in substance that no statutory provision should be interpreted as abolishing or interfering with the fiduciary duty of directors, officers, employees or controlling stockholders nor with the obligation to respond in damages for a breach thereof.

defendants argued that the plaintiff had no capacity to continue the derivative action on behalf of the merged corporation because it was no longer in existence.

The issue in *Miller* was the same as the issue in the present action: whether the fact that under the law of the state of incorporation, a corporation would be unable to maintain an action should prevent (or in the present action terminate) a derivative action on behalf of that corporation and its sharholders to enforce rights created under the Federal Securities laws.

The court in *Miller* held that state corporation law could not be used to thwart the remedies provided in the Federal Securities laws.

> "The Federal Courts have a duty to 'be alert to provide such remedies as are necessary to make effective the congressional purpose.' *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 433 (1964). Despite a Pennsylvania statute to the contrary (and [as] has been hereinbefore mentioned, it is highly speculative that the law of that state would require such a contrary result), where there is an overriding federal law applicable, that federal law will 'control the appropriateness of redress'. Id. at 434. In other words, where an action is based on the federal securities laws, state substantive or procedural laws may not impede the application of the federal statute." 268 F. Supp. at 268.

We submit that *Miller* v. *Steinbach* correctly followed the mandate of this Court as set forth in *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964):

> "[W]e believe that the overriding federal law applicable here would, where the facts required, control the appropriateness of redress despite the provisions of state corporation law, for it 'is not uncommon for federal courts to fashion federal law where federal

rights are concerned.' *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448, 457 (1957)". 377 U.S. at 434.

The Court also ruled:

"It is for the federal courts 'to adjust their remedies so as to grant the necessary relief' where federally secured rights are invaded. 'And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.'" 377 U. S. at 433.

As recently as June 29, 1972, the Court of Appeals for the Second Circuit reaffirmed in *Popkin* v. *Bishop,* CCH Federal Securities Law Reports, paragraph 93,549, page 92,611 that "Where Rule 10b-5 properly extends, it will be applied regardless of any cause of action that may exist under state law." at p. 92,614.

The Court of Appeals for the First Circuit, in another context, emphasized the primacy of the federal securities laws in disregarding a state law requirement in the prosecution of a derivative action. In *Levitt* v. *Johnson,* 334 F. 2d 815, 819 (1st Cir. 1964) cert. den. 379 U.S. 961, the Court reversed a District Court dismissal of a stockholder derivative action arising under the Investment Company Act of 1940 on the ground that plaintiff had failed to make a demand on shareholders as required by Massachusetts law. The Court of Appeals stated:

"The district court's reasoning that since the stockholder's right is a derivative one his right to bring suit must be controlled by the local law of the state of incorporation in the absence of an explicit congressional direction to the contrary negates the intendment of the act and underestimates the role to be played by the federal courts in the implementation of national regulatory legislation."

McClure v. *Borne Chemical Co.*, 292 F. 2d 824 (3rd Cir. 1961) *cert. den.* 368 U. S. 939 presents a persuasive argument for reversing the Court below. There, the Court dealing with a Rule 10b-5 derivative action, rejected the applicability of a state security for expenses statute, stating:

> ". . . if a form of relief exists within the ambit of the federal court's historic equity jurisdiction, it should be available without reference to the peculiar requirements of local law. As Professor Moore puts it: 'Whether equitable relief should be granted and to what extent in federal matters is a matter properly within the domain of federal equity jurisprudence. Here, unlike in diversity cases, the federal courts are free of state remedial law.' 2 Moore's Federal Practice (2d ed.), Par. 2.09, p. 456.
>
> "The stockholder's derivative suit is such a form of relief. The action was early recognized by Chancery. [Foss v. Harbottle, 2 Hare 461.] It has long been familiar in the federal courts. • • • And since the passage of the Act of March 3, 1875, • • • conferring federal jurisdiction over cases arising under the Constitution and laws of the United States, many federal questions of importance have been raised in stockholder's derivative actions. • • • *Consequently we think that the right of a stockholder to sue on his corporation's federal cause of action is itself federal in nature and therefore not subject to special requirements for cognate actions under state law.*" (emphasis supplied) (at p. 833)

The Court then held:

> "In the present case there is a comprehensive body of federal law with respect to the bringing of derivative suits. Indeed, the derivative suit, and the limitations upon its use, were initially developed in the federal

courts . . . There is, therefore, no compulsion in the present case to adopt state law because it is the only developed body of law pursuant to which this federal right may be enforced.

"What is more important, we do not believe that Sections 10(b) and 29(b) of the Securities Exchange Act should be construed as being superimposed upon the stockholder-management relationship defined by state security for expenses statutes, since the federal provisions are a part of a statutory scheme which had as its purpose the creation of a new federal law of management-stockholder relations and which, therefore, may not be subordinated to limitations such as security for expenses statutes, reflecting state policy in the same area. It is true that federal law often depends upon state-created legal relationships. Admittedly, where, precedent to the enforcement of a federal right, a question arises on the resolution of which Congress has been silent, state law will be controlling in many instances. *But state law will only control where that law will not cut across the federal interests receiving expression in the federal rights sought to be enforced.*" (emphasis supplied) (at p. 834)

The *McClure* court concluded its discussion on this point by stating that "state interest in the present suit must be subordinated to the federal policy occupying the same field" (at p. 835).

In *McClure* the court was dealing only with a state statute providing for security for expenses. Nevertheless, it overrode state law which would affect the plaintiff shareholder's right to bring a derivative action for violation of Rule 10b-5 because that state law weakened the plaintiff's rights. If *McClure* properly reflects the state of the law, the instant cause must be reversed. In *McClure,* if the

defendant had prevailed, the result would not have been outright dismissal but merely a requirement that plaintiff post a bond. Here, the effect of the court's decision is that plaintiff is left with no remedy whatever despite a flagrant breach of Rule 10b-5.

In *Borak* v. *J. I. Case Co.*, 317 F. 2d 838 (6th Cir. 1963) affd. *sub. nom. J. I. Case* v. *Borak*, 377 U. S. 426, this Court held that the jurisdiction granted to federal courts under § 27 of the Securities Exchange Act "rendered the power to award damages and other retrospective relief" (at p. 849). In holding that in an action under § 14 of the Securities Exchange Act, the Court had jurisdiction to award retrospective relief, the court at p. 849 quoted *Deckert* v. *Independence Shares Corp.*, 311 U. S. 282:

> "The power to *enforce* implies the power to make effective the right of recovery afforded by the Act. And the power to make the right of recovery effective implies the power to utilize any of the procedures or actions normally available to the litigant according to the exigencies of the particular case * * *."

In *Blau* v. *Oppenheim*, 250 F. Supp. 881 (SDNY 1966), the court refused to dismiss a case arising under § 16(b) of the Securities Exchange Act following a merger of the corporation for whose benefit the action was brought:

> "It is true, as defendant states, that the section makes no reference to survivor or successor corporations of an issuer but neither does it contain any bar against the maintenance of 16(b) suits by such corporations or their security owners. To deny them the right to maintain suit would serve to defeat the purpose of the law; to accord them the right serves to further it. The defendant's position, if accepted, would substantially cut down the availability of section 16(b) as a remedy to security holders. Thus, under the defendant's concept, the right of security holders of an issuer

to institute suit under section 16(b) would be terminated whenever the issuer was merged with or succeeded by another corporation; the very act of dissolution of the issuer and the failure to bring suit by the date thereof would end the right of security holders to pursue the insider and have him disgorge his profits. This hardly conforms to the essential legislative policy of section 16(b).

"The defendant somewhat grudgingly concedes that his position, if upheld, would, as the SEC points out, enable unscrupulous insiders to arrange a merger or its equivalent to thwart the recovery of short-swing profits under section 16(b)." 250 F. Supp. at 886-887.

Surely, if unscrupulous insiders could arrange a merger or its equivalent to thwart § 16(b), they could similarly arrange a merger to avoid liability under Rule 10b-5. In effect, the decision of the court below gives to guilty directors license to terminate a case in which they may be defendants. Whether or not the defendants in this case resorted to such tactics, the fact remains that they have been gratuitously released from the federally defined liability for the consequences of their own wrongdoing.

The harsh result of a dismissal was avoidable—and the courts below should have sought to effectuate the congressional mandates of the Securities Exchange Act by adjusting the remedy available to plaintiff.

In *Gerstle* v. *Gamble-Skogmo,* 298 F. Supp. 66 (EDNY 1969), also a derivative action, the court held that, where the corporation becomes non-existent because of its merger into a surviving corporation, the corporate right to sue devolves upon the shareholders in their own right. In *Perlman* v. *Feldmann,* 219 F. 2d 173, 178 (2d Cir. 1955), a corporate director and president had in the course of his transactions in the company's securities received a personal

gain at the expense of the minority shareholders in the corporation.

> "Hence to the extent that the price received by Feldmann and his co-defendants included such a bonus, he is accountable to the minority stockholders who sue here. Restatement, Restitution §§ 190, 197 (1937); Seagrave Corp. v. Mount, supra, 6 Cir. 212 F. 2d 389. And plaintiffs, as they contend, are entitled to a recovery in their own right, instead of in right of the corporation (as in the usual derivative actions), since neither Wilport nor their successors in interest should share in any judgment which may be rendered."

In *Neisz* v. *Gorsuch,* 295 F. 2d 909 (9th Cir. 1961), which the District Court in our case found inapplicable because it involved a statutory merger, the court first held that upon completion of a merger, the plaintiff stockholder and the corporation on whose behalf he had brought a derivative action lost their standing and capacity to sue. However, the court pointed out that there were two means of saving the lawsuit. One was for the surviving corporation to intervene as a party plaintiff; the other was for some stockholder of the surviving corporation to intervene in a derivative capacity and to join the surviving corporation as a party defendant (295 F. 2d 913). Thereupon, instead of dismissing the action outright, the Circuit Court within the scope of its broad powers "under 28 U.S.C.A. § 2106", remanded the case in order to provide an opportunity for the surviving corporation to join, or be joined, in the lawsuit (p. 914).

A third alternative here would have been to permit the action to proceed as a class action under Rule 23 F. R. Civ. P. on behalf of USLIC shareholders, see e.g. *Gerstle* v. *Gamble-Skogmo* and *Perlman* v. *Feldmann, supra.*

In summary, the decision below will result in confusion as to the proper role of the federal courts in actions under

the Federal Securities laws where state laws affect the corporate status. It is inconsistant with decisions in other circuits. If permitted to stand, the decision will seriously hamper the rights granted under those statutes and will permit the states to restrict and impede rights granted under the Federal Securities laws. That restriction should not be permitted to stand because there are a variety of equitable alternatives available to a district court to permit a shareholder suing derivatively to continue his action where the corporation has been merged or dissolved.

CONCLUSION

This writ should be granted and the judgment of the Court of Appeals for the Fifth Circuit reversed.

Respectfully submitted,

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On the Petition:

KRAMER & LABATON

Dated: August 16, 1972

Appendix A—Opinion of Court of Appeals

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 71-3221

AARON KATZ, on behalf of himself and all other persons similarly situated,

Plaintiff-Appellant,

versus

NOLAN C. ASPINWELL, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Alabama

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(May 22 1972)

Before GEWIN, COLEMAN and INGRAHAM, Circuit Judges.

PER CURIAM: After oral argument, the judgment of the District Court in this case is affirmed upon the written opinion of the District Judge, *Katz* v. *Aspinwell*, —— F.Supp. —— (N.D., Ala., 1971).

AFFIRMED.

Appendix B—Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1971

No. 71-3221

D. C. Docket No. 64-612

AARON KATZ, on behalf of himself and all other persons similarly situated,

Plaintiff-Appellant,

versus

NOLAN C. ASPINWELL, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Alabama

Before GEWIN, COLEMAN and INGRAHAM, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was taken under submission by the Court upon the record and briefs on file for appellant, and was argued by counsel for appellee;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff-appellant pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

May 22, 1972

Issued as Mandate: JUN 13 1972

Appendix C—Opinion and Judgment of District Court

Order on Motions for Summary Judgment, Dated September 1, 1971.

IN THE

UNITED STATES DISTRICT COURT,

FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION.

AARON KATZ, on behalf of himself and all other persons similarly situated,

Plaintiff,

vs.

NOLAN C. ASPINWALL, *et al.*,

Defendants.

Civil Action No. 64-612

This is a derivative action brought by the plaintiff for the benefit of the United Security Life Insurance Company (USLIC) and in behalf of himself and all other stockholders of USLIC similarly situated.

The defendants have filed motions for summary judgment. The basis of these motions is that USLIC has been judicially dissolved since the institution of this suit and that on account thereof USLIC no longer has any claim or cause of action which the plaintiff herein or any other shareholder can maintain against the defendants.

Pursuant to a Plan of Rehabilitation and Reorganization approved by the Circuit Court of Jefferson County,

Alabama, USLIC, acting by its court-appointed agent, transferred and assigned all of its assets to the Public National Life Insurance Company, following which said court entered a decree dissolving USLIC as of January 20, 1970, at 5 p. m.

The Supreme Court of Alabama has spoken with clarity as to the affect of a dissolution on pending claims in favor of and against a corporation that has been dissolved.

In *Nelson* v. *Hubbard*, 11 So. 428, 96 Ala. 238, the court said:

> "The dissolution of a corporation implies its utter extinction and obliteration as a body capable of suing or being sued, or in whose favor obligations exist or upon which liabilities are imposed. For all legal purposes the dissolution is the death of the corporation; thereafter, it is a mere nonentity." . . .
>
> "[P]rolongation of the existence of the corporation, after its dissolution in a mode authorized by law, can not be recognized unless it is specially provided for by legislative enactment. The dissolution of a corporation works an abatement of suits then pending against it, and presents an insuperable impediment to the institution of new suits against it, unless some clear statutory provision prevents the termination of its existence, for the purposes of its organization, from having this effect. *Saltmarsh* v. *P. & M. Bank*, 17 Ala. 761; *National Bank* v. *Colby*, 21 Wall. 609; *Nevitt* v. *Bank of Fort Gibson*, 6 *S. & M.* (Miss.) 513; *Harvemeyer* v. *Superior Court*, 18 Amer. St. Rep. 192-211."

Appendix C—Opinion and Judgment of District Court

In *Fitts* v. *National Life Association of Hartford, Conn.*, 130 Ala. 413, 30 So. 374, it was stated:

> "Independent of statutory provisions, a corporation which has been finally dissolved by judicial decree is no longer a legal entity and, therefore, cannot be made a party defendant to a suit—*Nelson* v. *Hubbard*, 96 Ala. 238; *Saltmarsh* v. *P. & M. Bank*, 14 Ala. 668; s. c. 17 Ala. 766; *First Nat. Bank of Selma* v. *Colby*, 21 Wall. (U. S.) 609; *Thornton* v. *Marginal, etc., R. Co.*, 123 Mass. 32; *Combes* v. *Milwaukee, etc., R. Co.*, 27 L. R. A. (Wis.) 269; 2 Morawetz Priv. Corp., 1031."

More recently in *Ex parte Davis*, 230 Ala. 668, 162 So. 306 (1935), the court pronounced the rule to be as follows:

> "The dissolution of a corporation—aside from statutory provisions—implies its utter extinction, and obliteration as a body capable of suing and being sued. And it has been held in this state that for all legal purposes the dissolution is the death of the corporation; thereafter, it is a mere nonentity. The dissolution of a corporation works an abatement of suits then pending against it, and presents an insuperable impediment to the institution of new suits against such corporation, unless some statutory provisions prevents the termination of its existence, for the purpose of its organization, from having this effect. *Saltmarsh* v. *P. & M. Bank*, 17 Ala. 761; *Nelson* v. *Hubbard*, 96 Ala. 238, 11 So. 428, 17 L. R. A. 375.
>
> "In this state we have statutory provisions for the prolongation of corporate existence in cer-

tain cases, and for the purposes enumerated in the statute. Code, §7069. But this statute has no application to foreign corporations, nor to corporations dissolved by judicial decree. *Fitts* v. *National Life Ass'n of Hartford, Conn.*, 130 Ala. 413, 30 So. 374.

"So, then, when the said National Surety Company, a foreign corporation, was dissolved by a decree of the Supreme Court of the state of New York, the plaintiff's case then pending in the circuit court of Shelby County abated, and thereafter no further proceedings in said court could be had against it . . ."

The statutory provision referred to in *Ex parte Davis* now appears as a part of §21(86) of Title 10 of the Code, and provides that:

"Corporations whose charters have expired, or which have been dissolved *otherwise than by judicial decree,* continue to exist as bodies corporate for a period of five years after such dissolution for the purpose of prosecuting or defending suits, settling their business and affairs, collecting and disposing of their properties and distributing their assets, but not for the purpose of continuing their business." (Italics supplied.)

The fact that this is a stockholder's derivative action does not alter the rule. Such was the case in *Daugherty* v. *Ball* (U. S. D. C. Calif.), 43 F.R.D. 329, where the shareholders of Desilu transferred substantially all of its assets to Ball Productions, Inc. whose stock was in turn transferred to Gulf and Western Industries Inc. Ball Productions, Inc. was thereupon merged with Paramount Pictures Corporation, a wholly owned sub-

sidary of Gulf and Western. The name of Desilu was changed to DPI Liquidating Corp (DPI). DPI then filed a certificate to wind up and dissolve with the Secretary of State. The court ruled as follows:

> "It is clear to the Court and we conclude as a matter of law that, as a result of the 'practical merger' between DPI (Desilu) and Paramount, the corporate entity DPI (Desilu) no longer has any interest in the recovery sought by plaintiff herein . . . .
>
> "By reason of the foregoing, DPI (Desilu) no longer has any claim or cause of action which the plaintiff herein, or any other shareholder of DPI (Desilu), can bring or maintain against the individual defendants on behalf of DPI (Desilu).
>
> ". . . [S]ince, by reason of the 'practical merger' of DPI (Desilu) and Paramount, no former or existing shareholder could have any basis for bringing or prosecuting a derivative action on behalf of DPI (Desilu), this action should be dismissed on the merits without requiring the notice to other shareholders provided in Rule 23.1, Federal Rules of Civil Procedure, 28 U.S.C. Rule 23.1."

Holmes v. *Camp*, 175 N. Y. S. 349 (1919), did not involve a judicial dissolution and is otherwise distinguishable.[1]

The Court is of the opinion that the motions for summary judgment are due to be granted.

The notice to other shareholders will not be required. *Daugherty* v. *Ball, supra; Mullins* v. *De Soto Securities*

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[1] *Niesz* v. *Gorsuch*, 9 Cir., 295 F. 2d 909, involved a statutory merger and not a judicial dissolution.

Co., (W.D. La.) 45 F. Supp. 871;[3] *Moore, Federal Practice* (2nd ed.), par.(s) 23.80[3] and 23.1.24[2], and cases there cited.

It is, therefore, ORDERED, ADJUDGED and DECREED that the motions for summary judgment be and each of the same is hereby granted, and this action be and the same is hereby dismissed as to the defendants, E. F. Hill, W. L. Faucett, R. J. W. Hobbs, Howard E. Kooiman, W. E. Pescott, Jr., Paul S. Worrell; Mary Janet DeLong Wallis, Administratrix of the Estate of William Leon DeLong, Jr., deceased; and Nolan C. Aspinwall.

Pursuant to Rule 54(b) the Court directs the entry of a final judgment in favor of each of said named defendants and expressly determines that there is no just reason for delay for the entry of said judgment.

Done this the 1st day of September, 1971.

H. H. GROOMS,
United States District Judge

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[3] "The plaintiff pleads also that, under 23(c) of the Federal Rules of Civil Procedure, 'A class action shall not be dismissed or compromised without the approval of the court.' However, in *Hutchinson* v. *Fidelity Inv. Ass'n*, 4 Cir., 106 F. 2d 431, 436, 133 A.L.R. 1061, the court said: 'The notice therein provided for is required in case of voluntary dismissal or compromise of a class action, so as to limit the power of the named plaintiff to terminate the suit which he has brought for others as well as for himself. It was never intended, of course, that such notice should be a condition precedent to dismissal by the court after hearing on the merits.' The motion to dismiss sustained in this case is undeniably a 'hearing on the merits.' See *Pelelas* v. *Caterpillar Tractor Co.*, 7 Cir., 113 F. 2d 629" (rev'd on other grounds, 5 Cir., 136 F. 2d 55).

Appendix D—Securities Exchange Act of 1934 § 27

Title 15 U.S.C., § 78 aa [Securities Exchange Act of 1934 § 27] (In pertinent part)

The district courts of the United States, the district court of the United States for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. .....

AARON KATZ, on behalf of himself and all other persons similarly situated,

Petitioner

against

NOLAN C. ASPINWALL, E. F. HILL, MARY JANET DELONG WALLIS, Administratrix of the Estate of W. L. DELONG, JR., deceased, W. L. FAUCETT, R. J. W. HOBBS, H. E. KOOIMAN, W. E. PRESCOTT, JR., PAUL S. WORRELL,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents oppose the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit as filed by Petitioner Aaron Katz, and set forth herein ground why this cause should not be reviewed.

Opinion Below

The Court of Appeals, 459 F.2d 1045, affirmed the judgment and opinion of the District Court for the Northern District of Alabama, 342 F.Supp. 286.

Question Presented

May a minority stockholder be heard to complain for inaction by the parties in interest where a corporation on whose behalf a derivative action was filed was dissolved by judicial decree after notice to all stockholders and full hearing?

Statement of the Case

The judgment below affirmed an order of the United States District Court for the Northern District of Alabama, granting Defendants' Motion for Summary Judgment on the ground that the corporation on whose behalf the action had been brought had been dissolved by judicial decree. The following supplements Petitioner's Statement of the Case:

On January 20, 1970, in an action filed by the Superintendent of Insurance for the State of Alabama, the Circuit Court of Alabama, after notice to stockholders and all interested parties and after full hearing, adjudged the dissolution of United Security Life Insurance Company (USLIC), an Alabama corporation, on whose behalf this action was derivatively filed. A. 133a. Petitioner Katz had appeared, filed written pleadings, and made known the pendency of his derivative action, but did not seek to preserve the continued prosecution thereof. A. 65a. All assets and claims of USLIC (including the claims in the derivative suit) were transferred to Public National Life Insurance Company. A. 133a. The Alabama decree was not appealed. Since the decree of dissolution, no party in interest has intervened or filed any pleading to keep viable the derivative action. No party in interest filed objections to the transfer of assets and claims or to the dissolution of USLIC.

Reasons for Denying the Writ

Petitioner has asserted no decision of another court of appeals in conflict with the decision below, and no important question of federal law has been raised.

The decision below is in accordance with the general law applicable to dissolved corporations, which has been recognized by this Court for nearly 100 years. The rule of law is:

> "The decisions of this court are all to the effect that a private corporation in this country can exist only under the express law of the state or sovereignty by which it was created. Its dissolution puts an end to its existence, the result of which may be likened to the death of a natural person. There must be some statutory authority for the prolongation of its life, even for litigation purposes. Oklahoma Gas Co. v. Oklahoma, 273 U.S. 257, 47 S.Ct. 391, 71 L.Ed. 634; First National Bank v. Colby, 21 Wall. 609, 615, 22 L.Ed. 687; • • ."
>
> *Chicago Title & Trust Co. v. Forty-One Thirty-Six Wilcox Bldg. Corporation*
> 302 U.S. 120, 124
> 58 S.Ct. 125, 127 (1937)

The laws of Alabama contain no statutory authority for the prolongation for litigation purposes of the life of a corporation dissolved by judicial decree. (Opinion of District Court, Petitioner's Appendix C). Petitioner's basic contention that the State of Alabama divested the Federal Court of jurisdiction of the stockholders' derivative claim is therefore totally without merit.

Nothing is involved in this case which would permit any erosion of federal securities laws. Plaintiff has had his day in court and took no action in the Alabama Circuit Court

to preserve in USLIC or in himself the continued prosecution of this case. Neither he nor any party in interest, including Public National Life Insurance Company, the transferee of the claims asserted, intervened or filed any pleading in the federal derivative action to protect the viability of the claims asserted. The Ninth Circuit has pointed out what action could have been taken, stating:

> "Upon completion of the merger two means of saving the lawsuit were available, neither of which has so far been taken. One was for Provident as an indispensable party to intervene as party plaintiff. * *
>
> "The other course which would have kept this lawsuit viable following the merger was for some stockholder of Provident to intervene in a derivative capacity and to join Provident as a party defendant, had Provident refused to intervene voluntarily. Gorsuch could have assumed this position by a proper amendment of his complaint and by a motion to join Provident as a defendant, providing he was entitled to, and had surrendered his United stock and become a stockholder of Provident."
>
> *Niesz* v. *Gorsuch*, 9 Cir.
> 295 F.2d 909, 913 (1961)

Furthermore, Petitioner has wholly failed to show any conflict in the circuit courts of appeals. The primary case relied on is a decision of the District Court for the Southern District of New York, *Miller* v. *Steinbach*, 268 F.Supp. 255, which is clearly not in point in that the dissolved corporation there had wrongfully taken part in the acts complained of, and the recovery could go directly to the shareholders of the dissolved corporation, including the plaintiff minority stockholder.

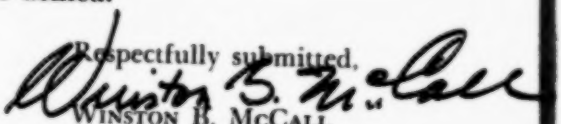
The other cases cited involved the primacy of federal law over state law. This rule of law is not remotely involved

in this case. Alabama has done nothing to impede or override federal law. Alabama has only said that it will not prolong for litigation purposes the life of an Alabama corporation dissolved by judicial decree.

Conclusion

The writ should be denied.

Respectfully submitted,



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Dated: August 31, 1972